FILED

No. 10-827

IN THE

Supreme Court of the United States

UNITED STATES, ex rel.
SALLY CHRISTINE SUMMERS,

Petitioner,

v.

LHC GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM H. JORDAN
Counsel of Record
JASON D. POPP
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
bill.jordan@alston.com

Attorneys for Respondent

234399

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a *qui tam* Relator's failure to file her complaint under seal in violation of the False Claims Act's filing requirements warrants dismissal, as the Sixth Circuit held.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent LHC Group, Inc. is publicly traded under the symbol LHCG. It does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

STATEMENT OF THE CASE

Petitioner Sally Christine Summers initiated this action on March 20, 2009 by filing a purported *qui tam* action under the federal False Claims Act, 31 U.S.C. § 3728 *et* seq. ("FCA"), on behalf of the United States, against Respondent LHC Group, Inc. Pet. App. 3a. Petitioner admits that she failed to file the Complaint under seal as required by the FCA. As a result of the failure to follow the requirements for filing a complaint under seal, the Complaint was posted on PACER, the publicly-accessible Internet-based portal providing access to court filings, on March 24, 2009. Pet. App. 4a; *see* 31 U.S.C. § 3730(b)(2) ("[An FCA *qui tam*] complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

Respondent filed a motion to dismiss based on Petitioner's failure to follow the FCA's statutory filing requirements. Pet. App. 3. The District Court granted LHC's motion to dismiss, holding that Petitioner's "failure to comply with the statute deprives her of the ability to pursue the remedy created by the statutes, and because the same failure incurably frustrates the underlying purpose of the procedural requirements." Pet. App. 47a. The Sixth Circuit affirmed the District Court's dismissal, holding that the FCA's statutory filing requirement is a mandatory prerequisite to filing. Pet. App. 23a ("An FCA plaintiff who cannot satisfy those [filing] conditions, like Summers, cannot bring suit in the name of the Government and has no basis for recovery.").

Petitioner seeks *certiorari* on the purported basis that the Sixth Circuit's decision conflicts with the Ninth

Circuit's decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). In that case, the Ninth Circuit held that a *post-filing* breach of the seal requirement does not automatically mandate a dismissal. *Id.* at 245-47. Instead, the Ninth Circuit engaged in a three-step balancing test to determine whether the complaint should be dismissed.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion...[and] will be granted only for compelling reasons." By mis-stating the holding in *Lujan*, Petitioner erroneously claims a conflict exists among the Courts of Appeals on an "important matter." Sup. Ct. R. 10(a); Pet. App. 4. As demonstrated below, however, there is no conflict. The fact that the Sixth Circuit in this case affirmed dismissal where the Petitioner failed *initially* to file her complaint consistent with the False Claims Act's mandatory requirements and the Ninth Circuit engaged in a balancing test to determine if a *post-filing* breach of the seal warranted dismissal does not create any conflict.

I. The Sixth Circuit's Decision Does Not Conflict with the Decision of Any Other Court of Appeal

Petitioner does not cite to, and Respondent is not aware of, any case that conflicts with the Sixth Circuit's holding that the FCA's filing requirement is a mandatory prerequisite to filing an FCA *qui tam* complaint. *See also, e.g., United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 (2d Cir. 1995) (abuse of discretion not to dismiss a *qui tam* action with prejudice where relator failed

to comply with the filing requirements). Instead, Petitioner posits that *Lujan*, in which the Ninth Circuit fashioned a balancing test (rather than authorizing automatic dismissal) for courts faced with an improper *post-filing* disclosure, cannot be "analytically distinguished from the case at bar" and therefore creates a conflict among the Courts of Appeal. Pet. App. 4. Yet in *Lujan* the relator satisfied the statutory requirements for filing under seal whereas Petitioner here did not. *See Lujan*, 67 F.3d at 243 ("Pursuant to § 3730(b)(2), Lujan filed her claim *in camera*, and served it on the Government along with the requisite written disclosure of information."). The *Lujan* relator violated the FCA's seal provisions by improperly disclosing information regarding the lawsuit sometime after she properly filed her complaint. As the district court in this case noted:

> "The factual context of *Lujan* is distinguishable from that of the case at bar, however, insofar as *Lujan* involved a post-filing violation of the seal requirement. The Ninth Circuit itself recognized that the violation there was 'qualitatively different than the violations in cases that have found dismissal was an appropriate sanction.'"

App. Pet. 40a.

The Sixth Circuit speculated, in dicta, that a court following *Lujan* might apply a balancing test, rather than issue a dismissal, to a *qui tam* complaint not filed under seal. Pet. App. 17a. This may or may not be true – but it was not the express holding in *Lujan* nor is it the case before this Court. *Certiorari* is not granted to

resolve inconsistencies in dicta, but to resolve differences in judgments. *See California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852, 2854 (1987) ("This Court 'reviews judgments, not statements in opinions.'"); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 241 (9th ed. 2007) ("[For certiorari to be granted] there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

This case and *Lujan* are not in conflict – and conflict on this matter will not arise unless and until a court decides not to dismiss an FCA *qui tam* complaint not properly filed under seal.

CONCLUSION

Because the Sixth Circuit correctly applied the laws governing the FCA, and because there is no conflict among the Courts of Appeal regarding the appropriate sanction for failure to file FCA *qui tam* complaints under seal, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

WILLIAM H. JORDAN
Counsel of Record
JASON D. POPP
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
bill.jordan@alston.com

Attorneys for Respondent